Before the
Administrative Hearing Commission
State of Missouri

LYNNCORE MEDGROUP, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12-0552 SP
	)	
DEPARTMENT OF SOCIAL SERVICES, MISSOURI MEDICAID AUDIT AND COMPLIANCE UNIT,	)	
	)	
Respondent.	)	

DECISION

The petitioner, Lynncore MedGroup, Inc. (Lynncore), a Missouri Medicaid provider, is subject to the sanction of recoupment in the amount of $570,202.90. It committed particularly serious and extensive violations of regulation and the terms of its participation in the MO HealthNet program when it submitted inappropriate claims for payment to, and obtained payment from, the respondent, the Department of Social Services, Missouri Medicaid Audit and Compliance Unit (the Department).

Procedure

Lynncore filed a complaint on April 5, 2012, challenging the Department's imposition of the sanction of recoupment. The Department answered on May 10, 2012.

Lynncore and the Department filed motions for summary decision on April 29 and May 29, 2013, respectively. The motions became ready for decision on June 18, 2013, when the last written argument was filed.

We may grant a motion for summary decision if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts. 1 CSR 15-3.446(6)(A).[1] Facts are established by admissible evidence. 1 CSR 15-3.446(6)(B). Here, Lynncore failed to demonstrate its entitlement to summary decision through admissible evidence. It relies in its motion on exhibits that establish undisputed or non-dispositive background facts, unauthenticated exhibits, and bare statements lacking evidentiary support or relying on exhibits that do not stand for the fact asserted.

In contrast, the Department demonstrated its entitlement to summary decision by establishing material facts with admissible evidence—affidavits and authenticated business records. Although Lynncore objected to the admissibility of two pieces of the Department's evidence, we overrule that objection, as discussed immediately below. We conclude Lynncore did not genuinely dispute the Department's evidence.

Evidentiary Ruling

Lynncore objects to the admissibility of the amended affidavit of Sandra Barnes ("the amended affidavit"),[2] and Exhibit 10 to the Department's motion.[3] The Department offers the amended affidavit, among other reasons, to authenticate its Exhibit 10, a spreadsheet containing certain data about Missouri or bordering state providers of durable medical equipment (DME).

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[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update, unless otherwise specified.

[2] The amended affidavit is not marked as an exhibit.

[3] Petitioner's Response to Respondent's Motion for Summary Decision, pp. 2-3, ¶ 4.

Lynncore argues that the amended affidavit essentially lacks a proper foundation as a business record and so does not suffice to authenticate Exhibit 10. We disagree.

Section 536.070(10), RSMo (Supp. 2012)[4] addresses business records as evidence in contested cases:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind[.]

Section 490.680, RSMo, addresses such records as evidence in cases, generally:

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The amended affidavit satisfies the standards under both § 536.070(10) and § 490.680. Ms. Barnes states that she is a Registered Nurse Supervisor in the Department's Missouri Medicaid Audit and Compliance Unit (MMAC). As part of her job duties, she supervises the Department analysts who perform post-payment reviews of the program's DME providers, a duty she has performed since before the Department initiated the Lynncore recoupment process. She previously worked, for 14 years, in the Department's Program Integrity Unit, which was

[4] References to "RSMo" are to the Revised Statutes of Missouri (2000), unless otherwise specified.

transferred into the MMAC, and from the time period covered by the Lynncore recoupment to the present, has been familiar with DME providers doing business in Missouri. She explains what Exhibit 10 contains and how it was prepared:

> Exhibit 10 is a compilation of records kept and maintained by the Department in the regular course of the Department's business, and it was the regular course of business of the Department for an employee or representative of the Department with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis.[5]

She further explains how the data was compiled and is organized on Exhibit 10, and how it relates to other evidence concerning claims made by Lynncore.

Ms. Barnes does not identify herself as the custodian of records for purposes of authenticating Exhibit 10. But she need not be. Section 536.070(10) does not require it, and § 490.680 specifically permits a custodian "or other qualified witness" to authenticate business records. Based on the entirety of her affidavit, we find Ms. Barnes qualified to authenticate the records, and the sources of information, method, and time of preparation of the records are such as to justify the exhibits' admission.

The amended affidavit and Exhibit 10 are competent evidence. We overrule the objection.[6]

Findings of Fact

1. The Department of Social Services is the single state agency for the state of Missouri charged with administering Missouri's Title XIX, Medicaid—or MO HealthNet—

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[5] Amended Affidavit of Sandra Barnes., p. 3, ¶ 7.

[6] Lynncore makes another argument in regard to Exhibit 10, essentially concerning the weight it should be afforded. Petitioner's Response to Respondent's Motion for Summary Decision, pp. 2-3, ¶ 4. We address the argument in the Findings of Fact, below.

program. Through the MO HealthNet Division, the Department determines providers' participation in the program and provider reimbursement; determines whether claims that providers have submitted, and the Department has paid, were proper; assesses overpayments; and administers sanctions.

2. Lynncore was enrolled in MO HealthNet as a non-bordering-state, out-of-state provider of durable medical equipment (DME), from July 24, 2000 through September 25, 2004, and December 2, 2004 through May 15, 2012, when it ended its participation.

3. Lynncore, through its president, Sandra Cates, executed a Title XIX Participation Agreement for DME services, which was in effect for the time period during which Lynncore submitted and received payment for the MO HealthNet claims at issue here. The agreement states in relevant part:

> - I agree the Missouri Title XIX Medicaid manual, bulletins, rules, regulations and amendments thereto shall govern and control my delivery of service.
>
> - I will comply with the Medicaid manual, bulletins, rules and regulations as required by the Division of Medical Services and the United States Department of Health and Human Services in the delivery of services and merchandise and in submitting claims for payment. I understand that in my field of participation I am not entitled to Medicaid reimbursement if I fail to so comply, and that I can be terminated from the program for failure to comply.[7] [Underlining added.]

4. The Department annually sent letters to Lynncore indicating Lynncore's enrollment period:

> - Letter of July 3, 2008—confirming May 16, 2008-May15, 2009 enrollment;
> - Letter of May 26, 2009—confirming May 15, 2009-May 14, 2010 enrollment;

[7] Affidavit of Clara Jean Evers, p. 2, ¶3 (not marked as an exhibit) and Exhibit 2.

- Letter of May 25, 2010—confirming May 16, 2010-May 14, 2011 enrollment; and
- Letter of July 8, 2011—confirming May 16, 2011-May 14, 2012 enrollment.

5. Every enrollment letter listed in the preceding paragraph contains the following statement:

> MO HealthNet participants are required to obtain services from Missouri or bordering state providers. MO HealthNet will consider enrollment of an out-of-state (non-bordering) provider **only if** Medicare coinsurance and/or deductible amounts on covered services are provided to participants who have **both** MO HealthNet and Medicare **or** the item needed is **NOT** available in Missouri or a bordering state of Missouri. If you request or receive prior authorization for equipment and/or supplies for a MO HealthNet participant who is **NOT** Medicare eligible, **or** request or receive authorization for services that **ARE** available in Missouri or a bordering state, you may be subject to sanctions and any amounts paid will be recouped.[8] [Bold and capitalization in original, underlining added.]

6. Since June 15, 2006, the Department's MO HealthNet Durable Medical Equipment Provider Manual has contained the following statement:

> Out of state (non bordering) providers who render services to MO HealthNet participants located in Missouri are ONLY permitted to receive reimbursement if:
>
> - Medicare coinsurance and/or deductible amounts on both covered services provided to participants who have *BOTH* MO HealthNet and Medicare.
>
> - Durable Medical Equipment (DME) equipment or supplies that are *NOT* available in Missouri or a bordering state of Missouri.
>
> If prior authorization is approved or reimbursement is made for a DME item(s) on behalf of a MO HealthNet participant who is *not* Medicare eligible, or for equipment and/or supplies that are available in Missouri or a bordering state, the reimbursement that

[8] Exhibits 3-6.

> was paid may be recouped.[9, 10] [Italics and capitalization in original, underlining added.]

7. The Department conducted a post-payment review of Lynncore's claims covering dates of service from November 25, 2008 through May 27, 2011. By letter dated March 12, 2013, the Department notified Lynncore that Lynncore had made billing errors and directed Lynncore to repay $570,202.90.[11]

8. Lynncore made more than 1,600 claims and was paid for DME it provided to more than 400 MO HealthNet participants who were in Missouri but not also Medicare participants, and the DME Lynncore provided was available in Missouri or the bordering states.[12] Lynncore obtained prior authorization for the claims it submitted for payment.

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[9] Exhibit 7.

[10] The DME Provider Manual is incorporated into and promulgated by regulation, 13 CSR § 70-60.010, and has been since November 2006. The present version of the regulation became effective July 30, 2009. We take official notice of the two immediately preceding versions, effective November 30, 2006, and November 25, 2008.

[11] In its Petition for Review, Lynncore refers to the disputed amount as both "$570,090.90" and as "$520,090.90," and in its subsequent motion and briefing also cites both figures. The totality of Lynncore's petition, including the attachments to which it refers, and the nature of its arguments herein, make clear that Lynncore is appealing the higher figure, that is, the full amount of the overpayment assessed by the Department, $570,090.90. We therefore treat Lynncore's citations of the lower figure as a typographical error.

[12] We draw this finding from Ms. Barnes' amended affidavit and the Department's Exhibit 10. Ms. Barnes explains in her affidavit (p. 3, ¶ 7; p. 4, ¶ 8; and p. 5, ¶ 11) that she is familiar with the types of DME represented in Lynncore's claims at issue here, and with in-state and bordering-state providers of DME, and that all of the items were available from them during the relevant time period, with one qualification regarding item "L3652 PREFAB DBL SHOULDER ORTHOSIS," listed in Exhibit 10. Ms. Barnes explains that that item is not a custom piece of equipment, and while not commonly used, is not difficult to obtain, and is presently available in Missouri and the bordering states. Amended affidavit, p. 4, ¶ 8. She "believes" it was available during the time period at issue here. *Id.* Lynncore argues that her "belief" is insufficient proof of the item's availability. Petitioner's Response to Respondent's Motion for Summary Decision, pp. 2-3, ¶ 4.

Given Ms. Barnes' background, discussed elsewhere, and the totality of her affidavit, we find the evidence of sufficient weight to establish the fact that all items of DME at issue, including item L3652, were available from Missouri or the bordering-states providers during the relevant time period. Moreover, Lynncore was on notice that the availability of all items was a basis for the Department's decision to sanction Lynncore, but Lynncore put on no evidence to the contrary. Lynncore bears the burden of proof here, § 621.055.1, and did not meet it.

9. The system the Department uses to process MO HealthNet claims affords very little scrutiny of claims prior to payment. Instead, it relies on the accuracy and truthfulness of providers who apply for and receive prior authorization and submit claims for payment. The Department must rely on post-payment review to itself determine whether payment was proper. Even the post-payment review process does not review every claim paid. Given the Department's resources, it would be impossible to review all claims before payment. The handling of the claims at issue here reflects the nature and limitations of the Department's processing system. The Department discovered that Lynncore's claims were improper after they had been paid, and after the Department performed the post-payment review described above.

Conclusions of Law

We have jurisdiction. § 208.156.5, RSMo.

The Department's answer provides notice of the basis for disallowing claims and imposing sanctions. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App. E.D. 1984). We have discretion to take any action the Department could have taken, and we need not exercise our discretion in the same way as the Department. *Dep't of Soc. Svs. v. Mellas*, 220 S.W.3d 778, 782-783 (Mo. App. W.D. 2007). Lynncore has the burden of proof. § 621.055.1, RSMo (Supp. 2012).

The issues here are whether the DME claims that Lynncore submitted for payment, and were paid, were claims the MO HealthNet program covers and, if so, whether a sanction is appropriate.

I. Whether the MO HealthNet program covers the claims at issue here

The Department asserts that the claims Lynncore submitted were not covered by the MO HealthNet program, because the MO HealthNet participants who received DME from Lynncore

were not also enrolled in Medicare, and because the same DME was available in Missouri or a bordering state.[13]

Lynncore was enrolled, at all times relevant, in the MO HealthNet program as a non-bordering-state, out-of-state provider of DME. Regulation 13 CSR 70-60.010(5) contains guidelines for out-of-state, non-bordering-state DME providers:

> (B) MO HealthNet participants are required to obtain services from Missouri or bordering state providers. MO HealthNet will consider enrollment of an out-of-state (non-bordering) durable medical equipment provider only if—
>
> 1. Medicare covered services are provided to patients who have both MO HealthNet and Medicare; or
>
> 2. The item needed is not available or does not have a comparable substitute from Missouri or bordering state providers.
>
> (C) If the provider requests authorization for equipment or supplies for a MO HealthNet patient who is not also Medicare eligible or requests authorization for services that are available or have a comparable substitute in Missouri or a bordering state, the out-of-state (non-bordering) provider may be subject to sanctions and any amounts paid by the MO HealthNet Division will be recouped.

The MO HealthNet Durable Medical Equipment Provider Manual, incorporated into and promulgated by regulation at all times relevant herein, contains written guidelines that substantially track 13 CSR 70-60.010(5)(B) and (C).

Likewise, the annual MO HealthNet provider enrollment letters the Department sent to Lynncore—four in total from July 2008 through July 2011—contain language similar to the regulation and provider manual.

The regulation, DME provider manual, and enrollment letters provide two scenarios in which an out-of-state, non-bordering-state DME provider may serve MO HealthNet participants.

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[13] Answer, pp. 9-10.

In the first, the MO HealthNet participant is also a Medicare participant. But none of the claims at issue here involved MO HealthNet participants who are also Medicare participants. In the other scenario, the item of DME is not available, or no comparable substitute is available, from a Missouri or a bordering state provider. But here, Lynncore's claims involved DME that was available in Missouri or the bordering states. Therefore, the out-of-state, non-bordering-state DME provider claims at issue here are not claims the MO HealthNet program covers.

II. Whether a sanction should be imposed

We next turn to the question of whether recoupment is appropriate, which we address in three parts—first, the preliminary matter of constitutional challenges to the imposition of sanctions and preservation of the challenges; whether grounds for sanctions exist; and finally, whether a sanction is warranted under the circumstances.

A. Lynncore's constitutional challenges to imposition of sanctions and the Department's preservation challenge

Lynncore raises constitutional challenges to the imposition of sanctions altogether. Lynncore is an out-of-state provider, and in the subgroup of Missouri's sister states that do not border Missouri. Lynncore alleges in its complaint that the regulatory distinction between Missouri and bordering-state providers, and out-of-state, non-bordering state providers like Lynncore, violates its rights to equal protection and due process of law as established by the United States Constitution.[14] Lynncore additionally argues in its motion for summary decision that the regulatory distinction violates its right to equal protection under the Missouri Constitution and violates the Missouri Constitution's prohibition against special laws found in Article III, § 40.[15]

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[14] Complaint, p. 6.

[15] Petitioner's Motion for Summary Decision, pp. 5-7.

The Department argues Lynncore has waived challenges raised for the first time in its motion and that the challenges have no merit in any event.[16]

Only the judiciary can declare the law; as an executive agency, this Commission cannot. *E.g., Cocktail Fortune, Inc. v. Dir. of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999); *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982) (courts declare the law, executive agencies cannot declare validity or invalidity of statutes and regulations). Our "adjudicative power…extends only to determination of facts and to application of *existing law* to the facts in order to resolve the issues confided to the agency expertise." *Air Evac EMS v. Dir. of Revenue*, 779 S.W.2d 573, 575-576 (Mo. banc 1989) (emphasis in original).

The regulations Lynncore challenges have never been held unconstitutional by a court, and as an executive agency, this Commission cannot declare them so. Therefore, Lynncore must raise its challenges in the courts.

We further conclude that the Department's argument concerning the sufficiency of Lynncore's preservation of its challenges is, essentially, not ripe because sufficiency is not relevant to or dispositive of the issues we can and must address herein. Whether Lynncore sufficiently preserved its challenges is likewise a matter for the courts.

Accordingly, we do not substantively address the constitutional challenges or sufficiency arguments, and deny any relief.

B. Whether grounds for the sanction of recoupment exist

The Department asserts in its answer[17] twelve grounds under 13 CSR 70-3.030(3)(A) for the imposition of sanctions:

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[16] Respondent's Suggestions in Opposition to Petitioner's Motion for Summary Decision, pp. 10-13.

[17] Answer, p. 17, ¶¶ 34-35.

1. Presenting, or causing to be presented, for payment any false or fraudulent claim for services or merchandise in the course of business related to MO HealthNet;

2. Submitting, or causing to be submitted, false information for the purpose of obtaining greater compensation than that to which the provider is entitled under applicable MO HealthNet program policies or rules, including, but not limited to, the billing or coding of services which results in payments in excess of the fee schedule for the service actually provided or billing or coding of services which results in payments in excess of the provider's charges to the general public for the same services or billing for higher level of service or increased number of units from those actually ordered or performed or both, or altering or falsifying medical records to obtain or verify a greater payment than authorized by a fee schedule or reimbursement plan;

3. Submitting, or causing to be submitted, false information for the purpose of meeting prior authorization requirements or for the purpose of obtaining payments in order to avoid the effect of those changes;

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6. Engaging in conduct or performing an act deemed improper or abusive of the MO HealthNet program or continuing the conduct following notification that the conduct should cease. This will include inappropriate or improper actions relating to the management of participants' personal funds or other funds;

7. Breaching of the terms of the MO HealthNet provider agreement of any current written and published policies and procedures of the MO HealthNet program (Such policies and procedures are contained in provider manuals or bulletins which are incorporated by reference and made a part of this rule as published by the Department of Social Services, MO HealthNet Division, 615 Howerton Court, Jefferson City, MO 65109, at its website www.dss.mo.gov/mhd, September 15, 2009. This rule does not incorporate any subsequent amendments or additions.) or failing to comply with the terms of the provider certification on the MO HealthNet claim form;

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11. Submitting a false or fraudulent application for provider status which misrepresents material facts. This shall include concealment or misrepresentation of material facts required on any provider agreements or questionnaires submitted by affiliates when the provider knew or should have known the contents of the submitted documents;

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13. Failing to meet standards required by state or federal law for participation (for example, licensure);

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28. Billing for services through an agent, which were upgraded from those actually ordered, performed; or billing or coding services, either directly or through an agent, in a manner that services are paid for as separate procedures when, in fact, the services were performed concurrently or sequentially and should have been billed or coded as integral components of a total service as prescribed in MO HealthNet policy for payment in a total payment less than the aggregate of the improperly separated services; or billing a higher level of service than is documented in the patient/client record; or unbundling procedure codes;

* * *

31. Failing to take reasonable measures to review claims for payment for accuracy, duplication, or other errors caused or committed by employees when the failure allows material errors in billing to occur. This includes failure to review remittance advice statements provided which results in payments which do not correspond with the actual services rendered;

32. Submitting improper or false claims to the state or its fiscal agent by an agent or employee of the provider;

* * *

37. Failure to comply with the provisions of the Missouri Department of Social Services, MO HealthNet Division Title XIX Participation Agreement with the provider relating to health care services; [and]

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> 40. Failure to submit proper diagnosis codes, procedure codes, billing codes regardless to whom the reimbursement is paid and regardless of whom in his/her employ or service produced or submitted the MO Health-Net claim[.]

As for the type of sanction, the Department asserts in its answer that recoupment is appropriate. The Department points to 13 CSR 70-3.030(3)(F) and (M), which provide for "[r]ecoupment from future provider payments" and "[r]etroactive denial of payments" in the case of regulatory violations, respectively, and 13 CSR 70-60.010(5)(C), which similarly provides for recoupment for violations.

We are mindful that 13 CSR 70-3.020(9) generally places responsibility for filing proper claims, using proper codes:

> The provider is responsible for all services provided and all claims filed using her/his MO HealthNet provider identifier regardless to whom the reimbursement is paid and regardless of whom in her/his employ or services produced or submitted the MO HealthNet claim, or both. The provider is responsible for submitting proper diagnosis codes, procedure codes, and billing codes. . . .
>
> *****

Lynncore violated ten of the above-cited subsections of 13 CSR 70-3.030(3)(A), which we address in turn:

1. Presenting for payment any false or fraudulent claim for merchandise in the course of business related to MO HealthNet—We conclude Lynncore's claims were false, as well as fraudulent. The word "false," as found in the dictionary, means

> **1 a :** not corresponding to the truth or reality **:** not true **:** ERRONEOUS, INCORRECT… **b :** intentionally untrue **:** LYING[.]

WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 819 (1986).

"Fraudulent" is the adjective form of the noun "fraud," an intentional tort at common law, typically defined by Missouri courts as including six elements:

> (1) a false material representation;

> (2) the speaker's knowledge of its falsity or his ignorance of its truth;
>
> (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated;
>
> (4) the hearer's ignorance of the falsity of the statement;
>
> (5) the hearer's reliance on its truth, and the right to rely thereon; and
>
> (6) proximate injury.

Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713, 720 (Mo. App. W.D. 1995) (and citations therein). *See also Hernandez v. State Bd. of Regis'n for the Healing Arts*, 936 S.W.2d 894, 899 n.2 (Mo. App. W.D. 1997) (physician licensing case under § 334.100, RSMo; holding that "fraud" contemplates evidence of "an intentional perversion of the truth to induce another…to act upon it").

The meanings of "false" and "fraudulent" overlap, inasmuch as the former may include intent, and the latter must. However, we should endeavor to give every word in the regulation meaning and to avoid an interpretation that would render a word "mere surplusage." *Langston v. Mo. Bd. of Probation and Parole,* 391 S.W.3d 473, 475 (Mo. App. W.D. 2012). *See also State ex rel. Evans v. Brown Builders Elec. Co., Inc.,* 254 S.W.3d 31, 35 (Mo. banc 2008) (statutes and regulations are interpreted according to the same rules). We therefore do not construe the word "false," as used in the regulation, to include the component of intent. To do so would essentially equate the word to fraud, and render "false" mere surplusage.

We conclude Lynncore's claims were false, for purposes of the regulation, inasmuch as they did not correspond to the truth or reality, were not true, and were erroneous and incorrect. As discussed above, Lynncore's claims were clearly not covered by the MO HealthNet program. 13 CSR 70-80.010(5)(B)—(C). Under Lynncore's participation agreement, the Missouri

Medicaid rules, regulations and bulletins governed and controlled its delivery of service, and submission of claims for payment The MO HealthNet Durable Medical Equipment Provider Manual, promulgated by regulation and in effect since 2006, included the rule about coverage of DME provided by out-of-state, non-bordering-state providers. The annual enrollment letters Lynncore received did, too. But Lynncore submitted more than 1,600 claims over the course of two and a half years, and obtained more than a half million dollars from MO HealthNet, when the claims clearly were not covered. The claims were therefore false.

Although the issue is close, we further conclude the claims were fraudulent. To be sure, the record contains no direct evidence of fraud, but it need not:

> Direct evidence of fraud rarely exists, "[b]ut fraud, like any other fact, may be established by circumstantial evidence." *Bank of New Cambria v. Briggs,* 361 Mo. 723, 236 S.W.2d 289, 291 (Mo. 1951). This may include indirect evidence of knowledge of or involvement in the conduct, as well as evidence of "similar transactions in the course of a continuous, systematic course of dealing." *Blakely v. Bradley,* 281 S.W.2d 835, 839 (Mo. 1955); *see also Chesus v. Watts*, 967 S.W.2d 97, 113 (Mo. App. 1998).

Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC, 361 S.W.3d 364, 371 (Mo. banc 2012).

All six elements of the definition of fraud are met here:

> (1) Lynncore submitted materially false claims.
>
> (2) Lynncore knew the claims were false. The regulation regarding coverage of DME claims by out-of-state, non-bordering state providers is short and crystal clear, and Lynncore received multiple notices reiterating, and reminding it about, the regulation. Lynncore agreed to abide by it and to submit claims in compliance therewith. The sheer magnitude of the claims at issue here, submitted over two and a half years, and Lynncore's failure to put on any evidence of measures it took to ensure claims it submitted were *proper*, also tend to prove Lynncore knew the claims were false.
>
> (3) Lynncore submitted the claims with the intent that the Department pay them.

> (4) The Department did not know, at the time the claims were submitted, of their falsity.
>
> (5) The Department relied on the truthfulness of the claims submitted, inasmuch as it paid them, and had the right to rely thereon, in view of Lynncore's execution of the provider agreement, the rules, and the notices the Department sent Lynncore.
>
> (6) Serious financial harm occurred to the MO HealthNet program.

Lynncore's claims were false, as well as fraudulent, for purposes of 13 CSR 70-3.030(3)(A)1.

2. Submitting false information for the purpose of obtaining greater compensation than that to which the provider is entitled under applicable MO HealthNet program policies or rules—See # 1, above. Lynncore submitted false and fraudulent claims for the purpose of obtaining compensation when it was entitled to none.

3. Submitting, or causing to be submitted, false information for the purpose of meeting prior authorization requirements—Lynncore sought and obtained prior authorization for false and fraudulent claims. Whatever information Lynncore submitted to obtain prior authorization for those claims cannot have been true for purposes of establishing Lynncore's entitlement to payment—the DME at issue was never covered. It therefore submitted false information for purposes of meeting prior authorization requirements.

6. Engaging in conduct or performing an act deemed improper or abusive of the MO HealthNet program— See # 1, above. Lynncore's submission of the false and fraudulent claims was improper and abusive of the program.

7. Breaching of the terms of the MO HealthNet provider agreement of any current written and published policies and procedures of the MO HealthNet program—See # 1, above.

13. Failing to meet standards required by state or federal law for participation (for example, licensure)—State standards for an out-of-state, non-bordering state, DME provider's participation are clear. Lynncore failed to meet them.

31. Failing to take reasonable measures to review claims for payment for accuracy, or other errors when the failure allows material errors in billing to occur—See # 1, above. As noted, Lynncore put on no evidence of reasonable measures it took to review these (or any of its) claims for accuracy or other errors. To the contrary, Lynncore merely argued in its motion for summary decision, p. 5, that it relied "on DSS' acceptance and payment of claims." The argument is unsupported. But even if true, it proves too much: Lynncore failed to take measures itself to prevent material billing errors, such errors were preventable, and such errors in fact occurred, establishing grounds for sanction under 13 CSR 70-3.030(3)(A)31.

32. Submitting improper or false claims to the state or its fiscal agent by an agent or employee of the provider— See ## 1, 2, and 6, above.

37. Failure to comply with the provisions of the Missouri Department of Social Services, MO HealthNet Division Title XIX Participation Agreement with the provider relating to health care services—Lynncore violated the terms of its provider participation agreement, which included its agreement to abide by the Medicaid manual, rules, regulations, and amendments controlling its delivery of service, and acknowledging that in its field of participation, it is not entitled to reimbursement when it fails to so comply.

40. Failure to submit proper diagnosis codes, procedure codes, or billing codes—Providers may only submit eligible claims. Lynncore's were not. It cannot have submitted proper codes for covered DME.

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We conclude Lynncore did not violate the remaining two subsections of 13 CSR 70-3.030(3)(A) cited by the Department, which we address in turn:

11. Submitting a false or fraudulent application for provider status which misrepresents material facts—The record does not demonstrate that Lynncore's provider application contained false or fraudulent information.

28. Billing for services different from those actually ordered or performed, or inappropriately billing or coding services as separate procedures when performed concurrently or sequentially; billing an inappropriately higher level of services than provided; or unbundling procedure codes—The record does not demonstrate billing errors of the type described in 13 CSR 70-3.030(3)(A)28.

C. Whether recoupment is warranted under the circumstances

We have concluded nine grounds for sanctions exist. The final issue is the sanction. The Department notified Lynncore by letter that it was imposing the sanction of full recoupment of the amounts paid, raised the same in its answer herein, and argues the propriety of the sanction in its motion. Although we need not reach the same conclusion as the Department, we conclude that recoupment of the full amount of the overpayment is the appropriate sanction.

The imposition of sanctions is discretionary and 13 CSR 70-3.030(5)(A) provides guidance for the exercise of that discretion:

> The following factors shall be considered in determining the sanction(s) to be imposed:
>
> 1. Seriousness of the offense(s)—The state agency shall consider the seriousness of the offense(s) including, but not limited to, whether or not an overpayment (that is, financial harm) occurred to the program, whether substandard services were rendered to MO HealthNet participants, or circumstances were such that the provider's behavior could have caused or contributed to inadequate or dangerous medical care for any patient(s), or a combination of these. Violation of pharmacy laws or rules, practices potentially

dangerous to patients and fraud are to be considered particularly serious;

2. Extent of violations—The state MO HealthNet agency shall consider the extent of the violations as measured by, but not limited to, the number of patients involved, the number of MO HealthNet claims involved, the number of dollars identified in any overpayment and the length of time over which the violations occurred;

3. History of prior violations—The state agency shall consider whether or not the provider has been given notice of prior violations of this rule or other program policies. If the provider has received notice and has failed to correct the deficiencies or has resumed the deficient performance, a history shall be given substantial weight supporting the agency's decision to invoke sanctions. If the history includes a prior imposition of sanction, the agency should not apply a lesser sanction in the second case, even if the subsequent violations are of a different nature;

4. Prior imposition of sanctions—The MO HealthNet agency shall consider more severe sanctions in cases where a provider has been subject to sanctions by the MO HealthNet program, any other governmental medical program, Medicare, or exclusion by any private medical insurance carriers for misconduct in billing or professional practice. Restricted or limited participation in compromise after being notified or a more severe sanction should be considered as a prior imposition of a sanction for the purpose of this subsection; [and]

5. Prior provision of provider education—In cases where sanctions are being considered for billing deficiencies only, the MO HealthNet agency may mitigate its sanction if it determines that prior provider education was not provided. In cases where sanctions are being considered for billing deficiencies only and prior provider education has been given, prior provider education followed by a repetition of the same billing deficiencies shall weigh heavily in support of the medical agency's decision to invoke severe sanctions[.]

We address the five factors in turn:

1. Seriousness of the offense—Here we consider whether financial harm occurred to the program. It did. Lynncore was overpaid more than half a million dollars. The offense was very serious due to the magnitude of the overpayment alone.

We also consider whether fraud occurred, a "particularly serious" offense under the regulation. 13 CSR 70-3.030(5)(A)1. We concluded, above, that fraud occurred.

We conclude the offense was particularly serious.

2. Extent of Violations—We must also consider the extent of the violations as measured by, but not limited to, the number of patients involved, the number of claims involved, the number of dollars identified in the overpayment, and the length of time over which the violations occurred.

Lynncore's errors were not isolated. It submitted more than 1,600 erroneous claims, over a period of two and a half years, involving some 400 recipients, and totaling more than half a million dollars. The violations were extensive.

3. History of Prior Violations—There is no evidence in the record of other violations in Lynncore's history.

4. Prior Imposition of Sanctions—There is no evidence in the record that the Department has previously imposed sanctions on Lynncore.

5. Prior Provision of Provider Education—Sanctions may be mitigated if the Department did not give the provider appropriate education. 13 CSR 70-3.030(5)(A)5. If it did, a more severe sanction may be appropriate if the same deficiencies were repeated. *Id.* There is no evidence in the record concerning provider education given to Lynncore, and we therefore conclude this fifth factor does not affect the analysis either way.

We add, in regard to mitigation, that the regulations with which Lynncore agreed to comply specifically address the provision of DME by out-of-state, non-bordering state DME

providers and are very clear. Lynncore was also affirmatively, specifically, and repeatedly notified of the rule, and of the consequences of failure to comply—including the likelihood of recoupment. Even if Lynncore did not receive provider education, such a lack would not support mitigation under these circumstances.

Lynncore argues that because the Department continued to reenroll it as a provider, it cannot be subject to recoupment.[18] We disagree. As previously discussed, Lynncore's president executed the participation agreement, committing Lynncore to comply with Missouri Medicaid rules, regulations and bulletins; specifically stating that Lynncore would comply with them in submitting claims for payment; and agreeing that Lynncore would not be entitled to reimbursement if it did not comply. The DME provider manual, promulgated by regulation, included the rule, and warned that non-qualifying claims, including claims for which "prior authorization is approved," were subject to recoupment.[19] The annual enrollment letters Lynncore received from the Department reiterated the rule and the warning that non-qualifying claims, including claims for which a provider "request[ed] or receive[d] authorization" and was paid, "will be recouped."[20] In short, Lynncore was on notice of the regulation; committed itself to following the regulation; was annually warned in the context of reenrollment that it was subject to recoupment if it failed to do so, including in cases in which it received prior authorization; and breached its provider agreement anyway. The Department's reenrollment of Lynncore establishes no basis to forego recoupment.

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[18] Petitioner's Motion for Summary Decision, p. 3, ¶ 6; Petitioner's Response to Respondent's Motion for Summary Decision, p. 2, ¶ 3.

[19] *See* Finding of Fact ¶ 6.

[20] *Id.*

Lynncore also argues that the Department's lack of pre-payment scrutiny, including the fact that it obtained prior authorization, excuses the violations.[21] The Department candidly explains that the system it uses to process MO HealthNet claims affords very little scrutiny of claims prior to payment, so the Department must rely on post-payment review to determine whether payment was proper. Even so, the post-payment review process does not involve review of every claim paid, and given the Department's resources, such comprehensive review would be impossible. As such, the Department discovered here that Lynncore's claims were improper only after Lynncore obtained payment, and after the Department performed the post-payment review described above.

Limited resources are a reality for government agencies. The Department's inclusion of notice about the rule in the provider agreement, and the warning in the materials it provided to Lynncore—about the likelihood of recoupment in cases in which non-qualifying, but preauthorized claims were paid—reflect a practical and reasonable, if in hindsight optimistic, approach to such limitation. No excuse from sanctions lies when a provider ignores clear and explicit warnings and breaches its provider agreement, because the Department lacked sufficient resources to block such payments from being put in the outstretched hand of a provider who has promised and who represents, at the risk of sanctions, that it is entitled to them. The Department's reliance on post-payment review to detect inappropriate claims does not mitigate Lynncore's responsibility for its offense.

Having considered the factors established by regulation, we conclude Lynncore should be sanctioned. It has no prior history of violations or sanctions, and provider education is not a factor here. But those factors are very much outweighed by the other factors—its offense was particularly serious and the violations were extensive. The claims it made and for which it was

[21] Petitioner's Motion for Summary Decision, pp. 4-5, ¶¶ 9-11; Petitioner's Response to Respondent's Motion for Summary Decision, p. 2, ¶ 3.

paid—for DME provided to persons who were *not* dual participants in Missouri Medicaid and in Medicare, or for DME *already available* from a Missouri or a bordering state provider—were the antithesis of the basis for its participation in the MO HealthNet program to begin with. We have also concluded Lynncore committed fraud. Requiring it to repay the full amount of its inappropriate claims, $570,202.90, is reasonable and appropriate.

We therefore order the sanction of recoupment, in the amount of $570,202.90.

Summary

The Department's motion for summary decision is granted. Lynncore's motion for summary decision is denied.

The hearing scheduled for August 8, 2013 is canceled.

SO ORDERED on July 18, 2013.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner